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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.S., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant.

E051571

(Super.Ct.No. RIJ098659)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County
Counsel, for Plaintiff and Respondent.

K.S. (Mother) appeals from an order terminating her parental rights concerning her son, A.S., pursuant to section 366.26 of the Welfare and Institutions Code.¹ Mother contends the court erred in failing to apply the beneficial parental relationship exception to adoption under section 366.26, subdivision (c)(1)(B)(i). We affirm the order.

I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. *Background*

In October 2009, the Riverside County Drug Endangered Children's Team went to Mother's home in response to a referral. Mother was under the influence of methamphetamine and A.S. was left in the care of Mother's boyfriend. A search of the home by law enforcement personnel revealed small bags containing methamphetamines, scales, pipes, propane torches, and guns within reach of the child. Mother was arrested on charges of child endangerment, possession of a controlled substance, and being under the influence of a controlled substance. The boyfriend was also arrested on child endangerment and drug-related charges. A.S. was 10 years old at the time. His father's whereabouts were unknown.

The Riverside County Department of Public Social Services (DPSS) took A.S. into protective custody and filed a juvenile dependency petition pursuant to section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). The petition was based, in part, on allegations that drug paraphernalia and guns were accessible to A.S.,

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother was under the influence of methamphetamine and allowed her boyfriend to care for the child, and she had failed to benefit from family reunification and maintenance services that were provided to her from April 2000 to January 2002. DPSS further alleged that A.S.'s father was not a member of A.S.'s household and had failed to provide for the child.

A.S. told a social worker he had seen drug paraphernalia in the house and baggies of "white stuff." He said Mother would invite friends over to the house where they would go in a room and lock the door; the room would get "all smoky," and A.S. thought "they were doing drugs." He told the social worker he believed his Mother and her boyfriend "are 'crack heads.'" The social worker said A.S. copes with Mother's substance abuse by "running away to another bedroom in the house." Regarding guns, A.S. said he has shot at cans in the backyard with small guns and once picked up a rifle.

In a report prepared for the jurisdictional and dispositional hearings, DPSS noted (in addition to the incident related to A.S.'s detention) Mother's numerous arrests and convictions on drug-related charges between 1989 and 2004.

A.S. reported that Mother had left him home alone after school on three occasions and "would always take [him] to school late." He said that when he gets into trouble, Mother "spanks me and never stops. . . . [S]he kicks me, socks me, hits me with her boot and slaps me on my stomach." When a social worker asked A.S. what his family would need to get better, A.S. said "he wanted his mom to stop using drugs and for everyone to stop fighting."

DPSS placed A.S. with his 26-year-old sister, Kristy. Kristy and her husband told the social worker “they have cared for [A.S.] a majority of his life and are more than willing to continue to provide and care for him.” A.S. told a social worker he feels safe and comfortable with Kristy. The social worker subsequently reported that A.S. “appears to be thriving in his current placement as he reports he feels safe and happy living with his sister and brother-in-law. . . . The caregivers appear to be meeting his needs as they are extremely attentive to his education, emotional, physical safety and well-being.” Kristy and her husband were subsequently identified as A.S.’s prospective adoptive parents.

In January 2010, the court found the allegations in the dependency petition true and declared A.S. to be a dependent of the court. The court also denied reunification services to Mother pursuant to section 361.5, subdivision (b)(13),² and set a hearing to be held pursuant to section 366.26.

B. Section 366.26 Hearing

In December 2009, James R. moved into Kristy and her husband’s home. James is Mother’s estranged husband and A.S.’s and Kristy’s stepfather. Although James is not

² Section 361.5, subdivision (b)(13) permits a court to deny reunification services based upon clear and convincing evidence that “the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court’s attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.”

A.S.'s biological father, he told a social worker that he is "still his dad and I love him so much. He'll never stop being my son." Regarding Kristy, he added, "it's already like [A.S. is] her own son. She couldn't give no more love to her own child."

The social workers reported that Mother "has visited with the child monthly" and the "visits have gone well." At a visit in December 2009, the social worker asked A.S. if he would like to remain living with his sister or reunify with Mother. According to the social worker, A.S. "got real quiet for about 1 minute and then stated he didn't know what he wants to do. He stated he would talk more about it with [the social worker] next time"

During the next visit, Mother brought a puzzle for her and A.S. to work on. A.S. was not interested in the puzzle at first, but eventually engaged in the activity with Mother. The social worker reported he was more interested in the new shoes he got for Christmas, which had wheels on them for skating.

At a visit in January 2010, A.S. did not want to work on a puzzle Mother brought. The social worker observed A.S. trying to upset Mother by bringing up information about the case. Mother stayed calm and A.S. was redirected.

In February 2010, A.S. told a social worker he enjoys living with his sister and brother-in-law and liked visiting with Mother. The following month, he told the social worker he wished his sister and brother-in-law would adopt him. In April, he again expressed his desired to be adopted by his sister. He also told the social worker he enjoyed his visit with Mother.

In a report prepared in May 2010 for the section 366.26 hearing, social workers stated that A.S. “appears to be bonded with his adult sister and uncle.” They added that “he feels safe in his current placement and well cared for. The current placement has been appropriate to meet his needs, providing him structure and stability. The caregiver [A.S.’s sister] has provided love and guidance while ensuring his educational, medical and emotional needs are met.” The social workers reported that A.S. said he would like to be adopted by his sister.

In a preliminary assessment of the prospective adoptive parents, social workers stated that A.S. “has adjusted well to being with his sister and her husband. The prospective adoptive parents are able to meet [A.S.’s] needs as evidenced by their routines, attention, and care provided to him in the home.” A.S. has developed a close relationship with both prospective adoptive parents. The social workers added that the prospective adoptive parents “have clearly expressed their desire and commitment to provide a permanent home for [A.S.]. . . . They believe they can provide [A.S.] with a stable, loving home, and they want him to have a happy, secure childhood. . . . [They] do not wish to consider any other permanent plan as they want to adopt [A.S.] so he can become their legal child.”

A social worker spoke with A.S. about adoption. He told the social worker: “‘I feel pretty good about it [being adopted]. I mean, a lot is on the good side, but I’m worried if my mom is going to be alright when I tell her my sister is going to adopt me. I

like it here. Me and [the prospective adoptive father] are like best buds. He's like my brother. He's cool. I want to stay here. I like it here.'"

In July 2010, Mother filed a request to change order in which she sought to vacate the section 366.26 hearing and to have the court order reunification services for her. The court denied the request.³

At the section 366.26 hearing, DPSS recommended that adoption be selected as A.S.'s permanent plan. A.S., through his counsel, joined in the recommendation. Mother objected to adoption based upon the parental benefit exception under section 366.26, subdivision (c)(1)(b)(i). Her testimony at the hearing is summarized as follows: A.S. has been in her care and custody for most of his life; when she visits with A.S., "he goes 'mommy' and he sees me and hugs me and gives me a kiss"; A.S. says he loves her; they play games during the visits; when the visits are over, A.S. "gets real quiet" and sad when Kristy was in view; she is opposed to the recommendation to terminate her parental rights, but "would be all right with" a legal guardianship arrangement; and she has maintained visitation with A.S. and loves him.

The court heard argument from counsel. Mother, who had stepped down from the witness stand, asked to speak. The court allowed it. Mother then said: "The reason why he wants to stay with his sister is because [of James (A.S.'s stepfather)]. If [James] was

³ Although the ruling denying Mother's request to change order is encompassed within Mother's notice of appeal, she does not assert any challenge to the ruling in her briefs on appeal. We therefore consider any issue concerning that ruling to be waived. (See *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1 [points not presented in opening brief are deemed abandoned or waived].)

to leave that house, he would want to go with [James] or with me. He doesn't want to stay with his sister, but he has no choice. I mean he's told that to his dad, and he's told that to me.”⁴

The court found it likely that A.S. will be adopted, that none of the exceptions to adoption applied, and that adoption is in the best interest of the child. The court ordered Mother's parental rights concerning A.S. terminated. Mother appealed.

II. ANALYSIS

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) “Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1).” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.)

The parental benefit exception is set forth in section 366.26, subdivision (c)(1)(B)(i). (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 297.) The exception applies when two conditions are satisfied: (1) the parent has “maintained regular visitation and contact with the child” and (2) “the child would benefit from continuing the relationship.” (*In re*

⁴ On appeal, the parties dispute whether the statements Mother made after she stepped down from the witness stand are evidence. We need not decide that issue because our decision would be the same regardless of whether we considered Mother's statement as evidence.

Angel B. (2002) 97 Cal.App.4th 454, 466; see § 366.26, subd. (c)(1)(B)(i).) Here, DPSS does not dispute the first condition; Mother maintained regular visits with A.S. We are concerned in this case with the second requirement.

The parent has the burden of establishing the applicability of the exception. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To satisfy this burden, the parent must show that his or her relationship with the child “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . . If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.] [¶] The parent must do more than demonstrate ‘frequent and loving contact[,]’ [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a ‘parental role’ in the child’s life.” (*Id.* at p. 827.)

“‘The balancing of competing considerations must be performed on a case-by-case basis and take into account many variables, including the age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs. [Citation.] When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.’” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349-1350.)

There must be a “compelling reason” for applying the parental benefit exception. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349; § 366.26, subd. (c)(1)(B)(i).) This “is a quintessentially discretionary determination.” (*In re Jasmine D.*, *supra*, at p. 1351.) Broad deference must be shown to the juvenile’s court’s discretionary determination, and this court will interfere only if, under all the evidence presented, viewed in the light most favorable to the juvenile court’s determination, we conclude no judge could reasonably have made the determination. (*Ibid.*)

Here, Mother’s argument that she established the applicability of the parental benefit exception to adoption is based essentially on the following: A.S. lived with Mother for 10 of his 11 years; the child “not only understands the concept of a biological parent, he perceives Mother as such and values their relationship”; A.S. “agonized over the choice between [Kristy] and Mother, and declined to favor [Kristy]; his choice was to live with Stepfather”; A.S. loves both Kristy and Mother; “he expressed concern that Mother not be hurt by [Kristy’s] adopting him”; and A.S. “expressed concern that he not be overly affectionate with Mother in [Kristy’s] presence.” “In other words,” Mother asserts, “he loves both, and wished to preserve both relationships.”

Mother’s factual premises are dubious. Contrary to her assertion that A.S. “declined to favor” Kristy, social workers reported that A.S. indicated his desire to be adopted by Kristy on at least three occasions spanning several months. A.S.’s statements contradict Mother’s assertion that A.S. was merely choosing to live with his stepfather. In addition, Mother’s statement that A.S. expressed concern about being overly

affectionate in Kristy's presence appears to be supported only by Mother's testimony that A.S. gets "real quiet" when it's time to end a visit and Kristy is in view. At best, Mother's interpretation of A.S.'s silence is a permissible inference; it is not, however, an inference we or the trial court are required to draw.

Contrary to Mother's view of the facts, there are facts from which the court could reasonably conclude that Mother did not occupy a parental role in A.S.'s life. Mother used drugs in the home in a manner that, if not openly visible to A.S., was sufficiently obvious for A.S. to conclude she was a "crack head." Kristy told a social worker that she and her husband had cared for A.S. most of his life and that Mother "did not really discipline" A.S. A.S. told a social worker that Mother was "always" late getting him to school. She kept guns and drug paraphernalia accessible to A.S.; and apparently did not prohibit or prevent the child from shooting guns in the backyard.

Even if Mother established that she occupied a parental role in A.S.'s life, these facts, as well as A.S.'s expressed desire to be adopted by Kristy, support the court's implied finding that the benefits of adoption outweighed the benefits of maintaining the parental relationship. Therefore, the court did not abuse its discretion in ruling that the parental benefit exception did not apply.

Mother relies heavily on *In re S.B.*, *supra*, 164 Cal.App.4th 289 and *In re Amber M.* (2002) 103 Cal.App.4th 681. Both are distinguishable. In *In re S.B.*, a bonding study described the bond between the child and parent as "'fairly strong' or 'moderate.'" (*In re S.B.*, *supra*, at p. 295.) "During the study, S.B. sat in [the father's] lap, played games and

colored. [The father] was responsive to her requests. In the middle of coloring, S.B. said to [the father], ‘I love you,’ and he responded in kind. S.B. whispered and joked with [the father] and then spontaneously said, ‘I wish I lived with you and Mommy and Nana.’” (*Ibid.*) At the hearing, the author testified that “because the bond between [the father] and S.B. was fairly strong, there was a potential for harm to S.B. were she to lose the parent-child relationship.” (*Id.* at p. 296.) The trial court found that the beneficial relationship exception did not apply and the Court of Appeal reversed. (*Id.* at p. 301.)

In explaining the reasons for reversing the trial court, the Court of Appeal in *In re S.B.* stated: “For the first year after she was removed from parental custody, S.B. continued to display a strong attachment to [the father]. She was unhappy when visits ended and tried to leave with [the father] when the visits were over. [The father] was sensitive to S.B.’s needs. Social worker Brown noted, ‘[the father] consistently puts his daughter[’]s needs and safety before his own.’ S.B. responded to [the father’s] attention. During one visit, S.B. ‘sat on [the father’s] lap . . . [and] proudly showed off the pink tennis shoes he had bought her.’ The record clearly establishes S.B. initiated physical contact with [the father]. Dr. Kelin observed that S.B. ‘ran into [the father’s] arms, again getting her father to pick her up.’ [The father] and S.B. shared an affectionate relationship. S.B. ‘nestle[d] up to [the father’s] neck’ and ‘whispered and joked with him.’ The record also shows S.B. loved [the father] and wanted their relationship to continue. S.B. whispered to her father, ‘I love you.’ As [the father] started to leave, S.B. stated, ‘I’ll miss you,’ and then she gave him another hug. S.B. spontaneously said, ‘I

wish I lived with you and Mommy and Nana.’” (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 298.) The court concluded: “The record shows S.B. loved her father, wanted their relationship to continue and derived some measure of benefit from his visits. Based on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant, positive relationship with [the father].” (*Id.* at pp. 300-301.)

The present case is distinguishable from *In re S.B.* The child’s expressions of love for the parent and her strong and clear desire to live with the parent in that case are not present here. Although visits between A.S. and Mother reportedly went well and A.S. reported that he liked visiting with Mother, there is nothing to indicate that he shared the kind of affection for Mother that S.B. expressed for her father. More importantly, in contrast to S.B.’s expressed desire to live with her father, A.S. indicated to the social worker that he wished to be adopted by Kristy and her husband. Because of the factual differences between this case and *In re S.B.*, that case is not controlling here.

In *In re Amber M.*, there was evidence by a psychologist that the mother and the dependent child “shared ‘a primary attachment’ and a ‘primary maternal relationship’ and that ‘[i]t could be detrimental’ to sever that relationship.” (*In re Amber M.*, *supra*, 103 Cal.App.4th at p. 689.) Here, there was no similar expert evidence and, as set forth above, ample contrary evidence. Accordingly, it is distinguishable from this case.

III. DISPOSITION

The order appealed from is affirmed.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.